Pan Wai Mei v Sam Weng Yee & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–02–116 OF 2005
GOPAL SRI RAM, AZMEL AND ZALEHA ZAHARI JJCA
5 DECEMBER 2005

Land Law — Sale of land — Auction — Claim for vacant possession — Successful bidder registered as proprietor of land — Chargor claimed that order of land administrator was nullity — Whether collateral attack on decision of land administrator against third party purchaser should be allowed

The first defendant and one Sim Thiam Chong were the co-proprietors of a property with each owning a one-half share each. They charged it to a bank but defaulted on payment of the loan. An auction was held and the land was sold to the plaintiff. In due course, the plaintiff obtained his certificate of proprietorship and he was duly registered as proprietor of the property. He then brought proceedings claiming vacant possession. The defendants did not appear and an order was made against them. They then applied to set aside the order made in default of appearance on the ground that the Land Administrator's order was a nullity. The learned judge dismissed their application. The first defendant appealed.

Held, dismissing the appeal:

(1) A common thread in a collateral attack against the decision of a public decision maker is that no stranger is involved in the challenge. In each case, the contest was either between the party that did the invalid act and the victim of the act or between two non-strangers (for example, the chargor and chargee) one of whom seeks to rely on an invalid act or decision made by public decision-maker (see para 14).

(2) The plaintiff was a third party — a stranger — to the invalid act. His claim was that he was the registered proprietor of the property in question and that he was asserting his right as such proprietor to have possession of it (see para 14). So far as he was concerned, the act of the Land Administrator in making the order for sale existed as a fact upon which he may and had acted. He had the legal power to act validly despite the alleged invalidity of the Land Administrator's act because his right to possession arose from his registered proprietorship of the land. The defendant had therefore no ground to resist the plaintiff's claim (see para 16). Hence, on the present facts, it was imperative for the defendant to have launched a frontal assault on the act of the Land Administrator and upon the plaintiff's registered title. In the absence of such an attack there was no arguable defence to the plaintiff's claim (see para 17).

[Bahasa Malaysia summary

Defendan pertama dan Sim Thiam Chong merupakan tuanpunya bersama harta yang mana masing-masing memiliki separuh bahagian daripadanya. Mereka telah

menggadainya ke bank tetapi telah gagal membuat bayaran pinjaman. Satu lelongan telah diadakan dan tanah itu telah dijual kepada plaintif. Berikutan itu, plaintif telah memperoleh sijil ketuanpunyaan dan beliau telah didaftarkan sebagai tuanpunya harta itu. Beliau kemudiannya telah memulakan prosiding menuntut milikan kosong. Defendan-defendan tidak hadir dan satu perintah telah dibuat terhadap mereka. Mereka kemudiannya memohon untuk mengenepikan perintah yang dibuat kerana gagal hadir atas alasan bahawa perintah Pentadbir Tanah adalah terbatal. Hakim yang bijaksana telah menolak permohonan mereka. Defendan pertama telah merayu.]

Diputuskan, menolak rayuan tersebut:

(1) Kebiasaannya dalam satu serangan kolateral terhadap keputusan pembuat keputusan awam adalah bahawa tiada orang luar yang terlibat dalam cabaran itu. Dalam setiap kes, pertandingan adalah sama ada antara pihak yang melakukan tindakan yang tidak sah dan mangsa tindakan itu atau antara dua orang yang bukan orang asing (contohnya, pemegang gadaian dan penggadai) yang ingin bergantung kepada tindakan tidak sah atau keputusan yang dibuat oleh pembuat keputusan awam (lihat perenggan 14).

(2) Plaintif merupakan pihak ketiga — orang asing — dalam tindakan tidak sah itu. Beliau menuntut bahawa beliau adalah tuanpunya berdaftar harta yang dipersoalkan dan bahawa beliau menegaskan hak beliau iaitu tuanpunya yang mempunyai milikan (lihat perenggan 14). Oleh itu beliau hanya pentingkan tindakan Pentadbir Tanah dalam membuat perintah jualan itu wujud pada hakikatnya di mana beliau boleh dan telah bertindak berdasarkannya. Beliau mempunyai kuasa sah untuk bertindak secara sah meskipun tindakan Pentadbir Tanah yang dikatakan tidak sah itu kerana hak beliau terhadap milikan timbul daripada ketuanpunyaan berdaftar beliau atas tanah itu. Defendan oleh itu tiada alasan untuk menolak tuntutan plaintif (lihat perenggan 16). Justeru itu, berdasarkan fakta-fakta semasa, adalah imperatif untuk defendan memulakan serangan terhadap tindakan Pentadbir Tanah dan hak milik berdaftar plaintif. Dalam ketiadaan serangan sedemikian, tiada pembelaan yang boleh dihujahkan terhadap tuntutan plaintif (lihat perenggan 17).

Notes

For cases on auction, sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3576–3598.

Cases referred to

Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby & Anor [2003] 6 MLJ 49 (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37 (refd)
F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry [1975] AC 295 (refd)
Hicks [1998] AC 92 (refd)
Wandsworth London Borough Council v Winder [1985] AC 461 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

Appeal from: Originating Summons No MT2–120 of 2004 (High Court, Kuantan)

Chan Guey Fa (Chan Guey Fa & Co) for the appellant.
Rajoo D Moorthy (Peter Lai Rajoo & Aiza) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This case concerns an action brought by the plaintiff (respondent before us) to obtain vacant possession of a property occupied by the first defendant (appellant before us). The facts are straightforward. Here they are.

[2] The first defendant and one Sim Thiam Chong were the co- proprietors of a property with each owning a one-half share each. They charged it to Southern Bank Berhad and borrowed money. They defaulted. Southern Bank wanted to recover its money. So it made an application to the Land Administrator for an order for sale. On 9 January 2003, the Land Administrator made an order for sale and directed that the land be sold by public auction. Later, an auction was held and the land was sold to the plaintiff who was the successful bidder. All this happened in the 2003. In due course, the plaintiff obtained his certificate of proprietorship and he was duly registered as proprietor of the property. He then brought proceedings in 2004 claiming vacant possession. The defendants did not appear and an order was made against them. They then applied to set aside the order made in default of appearance. I may add that this is the very first time that the defendants took any step in the matter. The learned judge dismissed their application. The first defendant appealed to us. At the conclusion of the argument in support of the appeal this court dismissed the appeal without calling upon counsel for the plaintiff to make a reply.

[3] Ordinarily, in a case as this, a judgment will not be usually be issued. The judge had all the relevant material before him. He went through it thoroughly and concluded that there was no merit in the defendants' application. That would, in the normal course of events have been the end of that. But before us the appellant raised a jurisdictional point. He was certainly entitled to do that. A jurisdictional point may be raised for the first time on appeal. That was decided in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9. Besides, the point taken has a public law dimension and in that context is a very important one. And it is interesting. It has to do with the theory of the second actor in the context of the doctrine of collateral attack. As presently advised, there has been only one reported case from South Africa that has acted upon it.

[4] The appellant's case before us is that the land administrator's order is a nullity. I do not think that it is. But I will, for the purpose of argument, assume that it is. Yet, in my judgment it does not, in circumstances as the present, affect the result of the appeal.

[5] Now, you must remember that neither the appellant nor his co-defendant took any steps to directly challenge the order for sale or the public auction as being invalid.

When I put this to learned counsel for the appellant he submitted that his client could mount a collateral challenge against the Land Administrator's order in the present proceedings. He cited to us the now famous passage in the judgment of Abdoolcader J in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at p 736, Lord Diplock LJ (now a Law Lord) said that, 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

[6] With respect, I am unable to agree with counsel's submission. This is a case to which the doctrine of collateral challenge does not apply. In order to appreciate the point that I seek to make it is necessary to begin with the following well known dictum of Lord Radcliffe in *Smith v East Elloe Rural District Council & Ors* [1956] AC 736:

> An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

[7] In *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock laid down the true principle governing the judicial review of public law acts and decisions:

> Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed. It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings (cf *Ridge v Baldwin* [1964] AC 40). Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.

[8] Again, in *Boddington v British Transport Police* [1999] 2 AC 143, Lord Irvine said:

> Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that *the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all.* The burden in such a case is on the defendant to establish on a balance of probabilities that the subordinate legislation or the administrative act is invalid: see also *TC Coombs & Co (a firm) v IRC* [1991] 3 All ER 623, [1991] 2 AC 283. This is the principle to which Lord Diplock referred in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128; [1975] AC 295. (Emphasis added.)

[9] So, the general rule to be distilled from the authorities is this. An act, omission or decision of a public decision maker is only invalid if all the following conditions are satisfied:

(i) there must be proceedings properly brought, that is to say proceedings untainted with procedural infirmity;

(ii) those proceedings must be brought by a person having locus standi;

(iii) the applicant must seek the proper remedy. But this condition is no longer relevant in our jurisdiction since on an application for judicial review made under O 53 of the Rules of the High Court 1980, the court is not confined to the relief claimed but may mould the proper remedy to suit a particular case;

(iv) the decision, act omission or decision must be quashed, set aside or declared void by a court of competent jurisdiction.

(see *Administrative Law by Wade & Forsyth* (9th Ed) at pp 301–302).

[10] The foregoing general rule is subject to the doctrine of collateral attack. In proceedings brought in reliance of an invalid act or decision, a defendant or an accused may plead the invalidity by way of defence in civil or criminal proceedings. An example of a collateral attack in civil proceedings is *Wandsworth London Borough Council v Winder* [1985] AC 461 where the facts were these. The appellant Council served two notices of increase of rent on the respondent who was its tenant. The respondent having refused to pay the increase, the Council brought proceedings to recover it. The tenant delivered a defence and a counterclaim in which he claimed that the notices increasing the rent were ultra vires and void. The Council applied to strike out the defence and counterclaim on the ground that it was an abuse of process because the proper course was for the tenant to have moved for judicial review under O 53. The tenant failed at first instance. On appeal, the Court of Appeal reversed. On further appeal, the House of Lords affirmed the Court of Appeal. Lord Fraser of Tullybelton who delivered the leading speech in the House said:

> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his

defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. A

[11] Another example of a collateral attack in civil proceedings is *Eu Finance Berhad v Lim Yoke Foo*. The chargor, Lim, had charged 20 titles to land to the appellant chargee. He having made default the chargee obtained an order for sale (the first order) from the Collector of Land Revenue, Kuantan. By error, the Collector's order included only 12 out of the 20 titles. When the error was pointed out, the Collector acknowledged it and confirmed that the first order covered all 20 titles. Later, the Collector cancelled the order for sale and issued a second order for sale in which the sum due was the same as that set out in the first order. This was wrong as the sum had since escalated because of the accruing interest. Later still, the Collector informed the appellant chargee that the chargor had paid to him in full the sum set out in the second order for sale. The appellant protested. The respondent chargor then issued writ claiming the return of the titles to his land from the chargor. The appellant defended the action and counterclaimed for a declaration that the first order was still subsisting. The trial judge found for the respondent and dismissed the counterclaim. On appeal to the Federal Court, it was held that the second order for sale on which the respondent chargor relied was invalid. It was in that context that Abdoolcader J uttered the words quoted earlier in this judgment. B C D

[12] An example of a collateral attack in a criminal case is Boddington to which I have already referred. There, the appellant, Boddington was convicted of smoking in a railway carriage contrary to a byelaw. The appellant appealed by way of case stated to the Divisional Court which affirmed the conviction. On further appeal to the House of Lords, the question arose whether the appellant could challenge the validity of the byelaw in question. It was held that he could. But it must be borne in mind that not all matters of alleged invalidity can be raised by way of a collateral attack in criminal proceedings. Vitiating elements such as bad faith, bias or other procedural impropriety are best suited to be raised and dealt with on an application for judicial review (see *R v Hicks* [1998] AC 92). E F

[13] In my judgment, the law has been accurately summarised by Kang Hwee Gee J in *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby & Anor* [2003] 6 MLJ 49 as follows: G

> In applying public law principles to the issues at hand, I am not unmindful of the fact that in the normal course a challenge on an administrative decision is normally made by a public law action for judicial review where the decision itself may be quashed by the court. But an administrative act may be impeached in the course of a collateral proceeding, where its impropriety is quite obvious as in the instant case. H
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> Thus if a contract is based on an unlawful exercise of power, the courts will treat that contract as void (see *Credit Suisse v Allerdale Borough Council* [1996] 4 All ER 129). Similarly, in a criminal proceeding the accused is entitled to raise as a defence as of right the invalidity of an administrative act or measure for which he is charged with for violating and would be entitled to an acquittal if he establishes on a balance of probabilities, that act to be invalid (see *Boddington v British Transport Police* [1998] 2 All ER 203 and *Halsbury's Laws of England* 2001 Reissue, para 26 footnote 3). I

[14] Now, if you look carefully enough at the cases where a collateral attack succeeded you will find a common thread that runs through them all. It is that no stranger was involved in the challenge. In each case the contest was either between the party that did the invalid act (for example, the Council in *Wandsworth London Borough Council v Winder*) and the victim of the act or between two non-strangers (for example, the chargor and chargee in *Eu Finance Berhad v Lim Yoke Foo*) one of whom seeks to rely on an invalid act or decision made by public decision-maker. In the present appeal, the plaintiff is neither the Land Administrator who did the alleged invalid act nor is he the chargee as in the *Eu Finance* case. He is a third party — a stranger — to the invalid act. His claim is that he is the registered proprietor of the property in question and that he is asserting his right as such proprietor to have possession of it. The fact that he purchased it at a public auction is neither here nor there.

[15] It is to meet such cases as the present that Professor Forsyth of the University of Cambridge has advanced the theory of the second actor (see *The Golden Metwand* by Forsyth & Hare; 'The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in *Essays on Public Law in Honour of Sir William Wade OC* ed Christopher Forsyth and Ivan Hare (Clarendon Press) 141). The theory is one that has both the merit of logic and judicial support. Professor Forsyth's view on the acts and decisions of public decision-making bodies is as follows:

> (i) an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second; and
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> (ii) But they [the administrative acts] clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.

[16] This theory was commented on favourably by Lord Steyn in Boddington's case where he accepted 'the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth who summarised the position … in *The Metaphysic of Nullity - Invalidity, Conceptual Reasoning and the Rule of Law,* …. The theory has been accepted and acted upon by the Supreme Court of Appeal of South Africa in *Oudekraal Estates (Ptv) Ltd v The City of Cape Town & Ors* [2004] ZASCA 48. In my judgment, it squarely applies to the present instance.

[17] As I have already said, the plaintiff is a stranger to the alleged invalid act. So far as he is concerned, the act of the land administrator in making the order for sale exists as a fact upon which he may and has acted. He has the legal power to act validly despite the alleged invalidity of the land administrator's act because his right

to possession arises from his registered proprietorship of the land. The defendant has therefore no ground to resist the plaintiff's claim.

[18] Hence, on the present facts, it was imperative for the defendant to have launched a frontal assault on the act of the Land Administrator and upon the plaintiff's registered title. In the absence of such an attack there is no arguable defence to the plaintiff's claim. And an arguable defence is a *sine qua non* in a case as this (see *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312). The judge was therefore plainly right when he refused to set aside the order made in the defendant's default.

[19] For the reasons already given, the appeal is devoid of any merit. It was, as I have already said, dismissed and the usual orders consequent upon a dismissal were made.

[20] My learned brother, Azmel and my learned sister Zaleha Zahari JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Loo Lai Mee